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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 170

STONYBROOK, INC.,

Appellant,

STATE OF CONNECTICUT,

Appellee.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 470

STONYBROOK, INC.,

Appellant,

v.

STATE OF CONNECTICUT,

Appellee.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

Appellee has moved to dismiss on the ground that this Court lacks jurisdiction of the appeal. There is no suggestion that the federal questions presented are not substantial or should not be considered by this Court if it has jurisdiction. The jurisdictional statute relied upon by appellant is 28 U.S.C. § 1257(2), which provides that final judgments rendered by the highest court of a state in which decision may be had may be reviewed by this Court:

> "By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

We believe that the Jurisdictional Statement demonstrates this Court's jurisdiction under that statute, but we deal more fully in this brief with the objections raised in the Motion to Dismiss.

Appellant contends, in its Jurisdictional Statement, that certain provisions of the Stratford building code, as construed and applied to appellant in the opinion and judgment of the Connecticut Supreme Court of Errors, (1) are contrary to the Lanham Act, (2) interfere with the disposition by the United States of its property in violation of the federal constitution, and (3) discriminate against the United States and those with whom it deals in violation of the federal constitution. An appeal lies to this Court where a state court rejects claims that a state statute is invalid as applied in the particular case by reason of the federal constitution or laws, as well as in those situations where the claimed invalidity extends to the state statute on its face or *in toto*. *Danke-Walker Co.* v. *Bondurant*, 257 U.S. 282, 287-289 (1921); Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, §11, pp. 21-24 (Wolfson & Kurland ed., 1951).

Appellee claims, however, that this Court does not have jurisdiction on appeal of the Lanham Act issue because it can be brought here only by petition for writ of certiorari, and that this Court does not have jurisdiction of the constitutional issues because they were neither raised before nor expressly passed upon by the Connecticut Supreme Court of Errors. No other objections have been suggested by appellee, and we show below that those which have been suggested are without merit. We deal first with jurisdiction of the constitutional issues.

Jurisdiction of the Constitutional Issues

A. The claim of discrimination against the United States and those with whom it deals was first made in the Motion for Reargument filed by appellant in the court below and denied by that court without opinion.[1] But as pointed out in the Jurisdictional Statement (p. 9) and in the Motion for Reargument (pp. 8-9), without denial by appellee, that issue arose from an interpretation of Section 502 of the Stratford building code by the Supreme Court of Errors which had not been suggested by the trial court or by appellee, and which could not reasonably have been anticipated by appellant prior to the opinion of the Supreme Court of Errors. Consequently, the Motion for Reargument was appellant's first opportunity to raise the issue. This is sufficient for purposes of the jurisdiction of this Court over the issue even though the court below denied the Motion without opinion. *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 677-678 (1930); *Missouri v. Gehner*, 281 U.S. 313, 320 (1939); Robertson & Kirkham, *supra*, § 76, pp. 130-131.

Section 502 of the Stratford building code authorizes the continuance, without compliance with other provisions of the code, of "legal" uses in existence as of the time the code was enacted in 1943, if not dangerous to life. Appellant contended at all times that the existing use of Stonybrook Gardens by the Government was "legal" by reason of the Property Clause of the Constitution and the express provisions of the Lanham Act when the building code was enacted, that the change in ownership did not constitute a change in use, and that Section 502 otherwise was applicable to Stonybrook Gardens. In its opinion, the

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[1] The Motion for Reargument is part of the record filed in this Court. Concededly (Motion to Dismiss, at p. 2), the Motion was timely.

trial court held that "the Federal Government . . . was exempted during the period of construction and control of the housing project from any local regulations or ordinances," noted that "all counsel are in complete accord on this point," but held with reference to Section 502 that: "What may have been legal under Government ownership, does not necessarily make it legal after the Government divested itself of title by sale to the defendant's predecessor in title."[2]

Appellant assigned this ruling as error[3] and on the appeal vigorously attacked the trial court's ruling that the change of ownership effected a change in the use of Stonybrook Gardens or of its legality so that it ceased to be a "legal" pre-existing use under Section 502 upon sale by the Government. The Supreme Court of Errors agreed that the change in ownership was not material to the legality of the use under Section 502,[4] but held that the use of the property by the Government (and thus by appellant) was not "legal" within the meaning of that word as used in Section 502 which was construed to include only uses authorized by prior Stratford building codes.[5] As shown above, this interpretation of "legal" had not been adopted or suggested by the trial court, it had not been urged by appellee, and appellant could not reasonably be expected

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[2] Jurisdictional Statement, App. C, pp. 38, 39. In paragraph 26 of its findings (which are in the record filed here) the trial court similarly found that: "Although the violations were not illegal under government ownership of the property, such violations could not become legal as a result of the government divesting itself of title to the defendant's predecessor in title."

[3] Paragraphs A.2. (a) (b) and (c), A.3. (a) and (b), A.5. and B.2. of Assignment of Errors (Motion to Dismiss, App.A; pp. 1a-6a).

[4] "The legality of the use, within the meaning of § 502, depends on the nature of the use rather than on the identity of the user." Jurisdictional Statement, App. A, p. 31.

[5] Jurisdictional Statement, App. A., pp. 31-32.

to anticipate that a use expressly authorized by federal law would not be classified as a "legal" use. Certainly, we were not and are not aware of any prior decisions suggesting that Section 502 would be so interpreted.[6]

In the Motion for Reargument, appellant contended that this highly restrictive interpretation of "legal" in Section 502 was unjustified by precedent or reason, could not have been intended by the Town of Stratford, and that (pp. 6-7):

> "If the Town of Stratford did so intend to discriminate against property erected in compliance with Federal rather than local law, as this Court in effect holds by its ruling that only buildings conforming with the provisions of the 1925 Building Code constitute a "legal" use within the meaning of section 502 of the 1943 Building Code, we submit that such a discriminatory application of the ordinance constitutes a violation of the Property and Supremacy clauses of the Constitution of the United States, and of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States."

Appellant then continued in the Motion (pp. 7-8) to advance substantially the same arguments, citing the same cases, as are found with respect to this issue at pp. 24-26 of the Jurisdictional Statement.

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[6] In its opinion (Jurisdictional Statement, App. A., p. 31), the court below suggested that the reader "[s]ee *Wallingford* v. *Roberts*, 145 Conn. 682, 684, 146 A.2d 588," but that case merely held that an existing nonconforming use as a trailer camp had not been created by the movement of five trailers onto the property in question the day before a zoning regulation became effective where the trailers had not been utilized on the land for any purpose or even connected with utilities. Stonybrook Gardens was put into actual use months before adoption of the 1943 building code.

Assuming that the issue properly could be raised on Motion for Reargument, this plainly sufficed to draw into question the validity of the building code, as construed and applied to appellant, under the federal constitution. See Robertson & Kirkham, *supra*, § 11, pp. 21-26. Appellee does not contend otherwise, and this Court took jurisdiction of an appeal from a state court in *Phillips Co. v. Dumas School Dist.*, 361 U.S. 376 (1960), where a similar issue was raised. For the reasons stated and under the authorities cited above, raising the issue for the first time in the Motion for Reargument was sufficient under the circumstances.

B. Appellant's other constitutional contention—that the building code as applied below to sustain the criminal conviction interferes with the disposition by the United States of its property in violation of the federal constitution, particularly in view of the retention by the United States of legal title to the property—was expressly considered and rejected by the Supreme Court of Errors. "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley v. Ohio*, 360 U.S. 423, 436 (1959). In such circumstances, appellee's contention (Motion to Dismiss, pp. 5-6) that the issue was not raised in the assignment of errors to, and thus need not have been considered by, the Supreme Court of Errors, is immaterial. "So far as the state court discussed these contentions with specific reference to the Constitution of the United States . . . they may be reviewed here [on appeal], notwithstanding the failure of appellants to mention them in their assignment of errors to the state supreme court, as required by its rules." *Nickey v. Mississippi*, 292 U.S. 393, 394 (1934). See generally, Robertson & Kirkham, *supra*, § 83, pp. 143-147.

In its opinion, the Supreme Court of Errors expressly considered appellant's contention that "the application of the building code to the property is contrary to the provisions of the Lanham Act and the federal constitution," in view of the fact that the Government had retained legal title to the property (Jurisdictional Statement, App. A., p. 29). The court below rejected this contention, held that the "sovereignity of the United States and its attendant immunity from state and local regulations ended with its sale of the property," held that the Lanham Act does not confer any authority upon appellant to fail to comply with the building code, and held that "under the circumstances, no such authority is conferred by the federal constitution." (*Id.*, at p. 30.) As noted in the Jurisdictional Statement (p. 7), without denial by appellee, these rulings were made in response to appellant's contentions in brief and oral argument based upon the Lanham Act and the Property Clause of the Constitution.

Indeed, in listing the "claims of law" which it concedes were "pursued diligently and properly" below appellant includes the claim that "the application of the building code to the property is contrary to the provisions of the Lanham Act and the federal constitution" in view of the retention of legal title by the Government. (Motion to Dismiss, p. 6.) We find difficult to understand how appellant can contend, in the face of this concession, that the constitutional issue in this regard (Question 2 in the Jurisdictional Statement) was neither raised before nor expressly passed upon by the Supreme Court of Errors. The issue is one that may be brought here on appeal if properly raised before or passed upon by the state court. See *United States* v. *Allegheny County*, 322 U.S. 174, 192 (1944); *Stewart & Co.* v. *Sadrakula*, 309 U.S. 94, 97 (1940); *Lee* v. *Osceola Imp. Dist.*, 268 U.S. 643, 644 (1925). The

opinion below expressly identified the "federal constitution" as the instrument relied upon and being considered, thereby establishing the federal nature of the claim in a sufficient manner. See *Bryant v. Zimmerman*, 278 U.S. 63, 67-69 (1928); *Saltonstall v. Saltonstall*, 276 U.S. 260, 267-268 (1928); *Edwards v. Elliott*, 21 Wall. 532, 549-551 (1874); *United States v. Allegheny County*, *supra*, at pp. 180, 192. In short, this constitutional issue is properly here on appeal.[7]

Jurisdiction of the Lanham Act Issue

Appellee concedes that this issue was properly raised below, but contends that it may be brought here only by petition for writ of certiorari and not by an appeal. The concession obviously is justified in view of the extensive consideration given to the issue by the Supreme Court of Errors. See pp. 6-7, *supra*. The stated basis for the contention, on page 9 of the Motion, is that the "question does not involve the application of the Stratford building code in a manner repugnant to the Lanham Act, but only a construction as to the meaning and intent of the Lanham Act."

No authority for this contention has been cited by appellee, and we are not altogether clear as to what is meant by it. The fact that a construction of the Lanham Act is involved cannot be decisive, as disposition of a claim that a state statute is repugnant to a federal statute or to the Constitution necessarily requires a construction of the federal statute or Constitution. There are many cases in

[7] It should be noted, with regard to all the issues before the Court, that appellant is not confined to the exact arguments presented below and may advance different theories or arguments in support of its position on the issues raised or decided below. *Raley v. Ohio*, *supra*, at p. 437, fn. 12; *Dewey v. Des Moines*, 173 U.S. 193, 197-198 (1899); *see Brannff Airways v. Nebraska Board*, 347 U.S. 590, 599 (1954); Stern & Grossman, Supreme Court Practice, p. 94 (2d ed., 1954).

which this Court has granted an appeal and proceeded to determine whether a state court had properly construed a federal statutory or constitutional provision. *See, e.g., Robinson v. California*, 370 U.S. 660 (1962), decided last term. Apparently the contention must be that the court below did not pass upon a claim that the building code as applied to appellant is repugnant to the Lanham Act, as required by 28 U.S.C. § 1257(2), but only a claim that the Lanham Act afforded appellant a "right, privilege or immunity" for which review is authorized by writ of certiorari under 28 U.S.C. § 1257(3). See Robertson & Kirkham, *supra*, § 16, pp. 34-35.

It is sometimes difficult to determine whether a claim of invalidity of a state statute or a claim of immunity under a federal statute or the Constitution is involved, as this determination appears to depend upon form rather than substance. "There is nothing to prevent the litigant from so phrasing his contention in the state court as to raise the point that his rights and immunities under the federal Constitution prevent the application of the state statute, rather than the point that the state statute, if so applied, would be invalid because repugnant to the federal Constitution, treaties or laws. And where he does so, an adverse decision by the state court is treated as denying his claim of federal rights or immunities, and not as a ruling upon the validity of the state statute, with the result that his remedy in the Supreme Court is by certiorari, not appeal. For this reason, some rather subtle but important distinctions have been drawn." Robertson & Kirkham, *supra*, at pp. 24-25.

While some aspects of the opinion below discuss the Lanham Act issue in terms of "immunity" from local regulation, we believe that the opinion as a whole makes clear that this issue also was raised and considered in terms of whether the Lanham Act invalidated an application of the

building code to appellant. The opinion commences its discussion of the Lanham Act by noting a claim by appellant that "the application of the building code to the property is contrary to the provisions of the Lanham Act and the federal constitution," and concluded, among other things, that the Congress in enacting the Lanham Act "will not be deemed to have intended to invalidate state or local rules for the protection of the public safety unless its purpose to do so is clearly stated."[8]

In any event, we have shown that this Court has jurisdiction on appeal of the constitutional issues. If so, the Lanham Act issue also may be brought here by the appeal even though review of that issue, standing alone, would have to be sought by petition for writ of certiorari. *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530, 547 (1922); Robertson & Kirkham, *supra*, § 21, pp. 48-49. Furthermore, 28 U.S.C. § 2103 provides that where an appeal is improvidently taken "this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken." Appellee has not contended that certiorari should not be granted if the appeal is improvident, and we have shown in our Jurisdictional Statement that the issues presented, including the Lanham Act issue, are both important and substantial and should be decided by this Court. See Rule 19(1)(a) of this Court. We submit, therefore, that this Court has jurisdiction on appeal of the Lanham Act issue and that certiorari should be granted if such jurisdiction is found not to exist.

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[8] Jurisdictional Statement, App. A, pp. 29, 30.

Conclusion

For the reasons stated above and in the Jurisdictional Statement, the Motion to Dismiss should be denied.

Respectfully submitted.

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